CONSTRUCTION OF DEEDS CONTAINING REPUGNANT PROVISIONS.—The history of a recent Hawaiian case presents both sides of a controversy of long standing as to the construction of inconsistent portions of a deed. The grantor, in consideration of love and affection, and one dollar, conveyed by deed a piece of land to her nephew, his heirs and assigns forever. Following the granting clause were two others, one of which provided that all previous instruments should be of no effect, the other that the deed should take effect only after the death of the grantor and that if the grantee died first the land should revert to the grantor and the instrument should be of no effect. The grantor survived and the grantee's heir-at-law brought ejectment. The trial court held that the deed conveyed to the grantee only an estate *in futuro* in fee, contingent upon his surviving the grantor. Upon appeal, the Supreme Court of Hawaii reversed the lower court and held that the subsequent clauses were repugnant to the granting clause and therefore should be rejected and the first clause sustained, and that the deed in question conveyed to the grantee an estate in fee simple. *Kahaulelio* v. *Ihihi*, 24 Haw. 292. The Supreme Court in turn was reversed by the United States Circuit Court of Appeals for the Ninth Circuit (April 5, 1920), 263 Fed. 817, which held that the instrument was of a testamentary character and not a deed (in this connection see 18 MICH. L. REV. 470), but that the same conclusion would be reached by holding it to be a deed. In the course of the opinion, the last court said: "Taking into consideration all of its provisions and endeavoring to give every part of it meaning and effect, it is obvious that the intention was to vest the title in the grantee in case he survived the grantor. That purpose being clear, there is no room for the application of the common law doctrine of repugnancy."

The common law dealt with conflicts of this sort in extremely rigid fashion, holding that the *habendum* could never divest or infringe an estate already vested by the granting clause and was void for repugnancy if it purported to do so. 4 KENT COMM. 524 [8th Ed.]; 2 Black. 298; BREWSTER, LAW OF CONVEYANCING, § 129; *Eldridge* v. *See Yup Co.*, 17 Cal. 44; *Riggin* v. *Love*, 72 Ill. 553; *Robinson* v. *Payne*, 58 Miss. 690; *Ratliffe* v. *Mars*, 87 Ky. 262. The application of this rule must have often resulted in defeating the actual and express intent of the grantor. In recognition of this fact, Kentucky cases of a comparatively early date are to be found which hold that in case of conflict the subsequent clause should control on the theory that it is the last expression of intention on the part of the grantor. *Bodine* v. *Arthur*, 91 Ky. 53; *Baskett* v. *Sellars*, 93 Ky. 2. These decisions were directly influenced by a statute providing that the grantee might take a fee by deed without the word "heirs" being used in the granting clause, unless a contrary intent was expressed in a subsequent portion of the instrument. This construction has been generally adopted under statutes of a similar nature. *Montgomery* v. *Sturtevant*, 41 Cal. 290; *Welch* v. *Welch*, 183 Ill. 237; *Miller* v. *Dunn*, 184 Mo. 318.

These statutes were the result of a protest against the formalism of the common law which soon began to manifest itself in numerous cases which

were not decided under the influence of a statute. It is said in *Brown* v. *Brown,* 168 N. C. 4: "We have well-nigh discarded the technical rule of the common law by which a deed was construed, under which undue prominence and effect were given to formal parts and their position in the instrument, to the sacrifice of the real intent of the grantor. We have gradually enlarged our view and liberalized our methods, which were narrow, and now seek after the intention by putting a construction on the deed as a whole and not paying too much attention to technical forms of expression which tend to conceal the true meaning. All parts of a deed are to be given due force and effect. The old rule is still of value where the intent cannot be determined." *Triplett* v. *Williams,* 149 N. C. 394; *Koehne* v. *Beattie,* 36 R. I. 316; and *Hughes* v. *Hammond,* 136 Ky. 394, are to the same effect.

The language of many of these cases would seem to indicate that the doctrine of repugnancy as a rule of law is practically a thing of the past. This is scarcely the case. It may safely be said that among the recent cases there is a great deal of language tending to support the decision of the trial court and the Court of Appeals in *Kahaulelio* v. *Ihihi, supra.* Nevertheless, there are still cases which cling steadfastly to the old rule.

In *Carllee* v. *Ellsberry,* 82 Ark. 209, the *habendum* contained a proviso to the effect that should the grantee die before her husband without issue the estate should revert to him. It was held that the proviso was repugnant to the granting clause and void. In 6 MICH. L. REV. 283 this case was said to be in accord with the great weight of authority in the United States. So numerous are the cases upon this point, however, that in the course of the same year (1907) a writer for the ILLINOIS LAW REVIEW found an abundance of cases to support his contention that the weight of authority was rapidly becoming settled to the contrary. 2 ILL. L. REV. 192. See also 12 L. R. A. (N. S.) 956. During the past year at least one case has been decided which is in accord with *Carllee* v. *Ellsberry, supra,* and the holding of the Supreme Court of Hawaii in *Kahaulelio* v. *Ihihi, supra.* This case held that the *habendum* and subsequent covenants may modify, limit and explain the grant, but cannot defeat it when it is expressed in clear, unambiguous language. The granting clause conveyed a fee and a subsequent clause contained a condition that the grantee should provide the grantor and his wife with a good home until their death, and that the title should vest in the grantee only on the death of both. It was held that a fee passed by the conveyance. *Bennett* v. *Bennett* (Vt.), 107 Atl. 304.

In spite of a few scattered cases to the same effect, it may safely be said that so far as language is concerned, the doctrine of repugnancy has been made at most a rule of construction in the majority of recent decisions upon the point. It is by no means clear, however, that all or even a majority of these would support the decision of the Court of Appeals in the principal case other than by *dicta.* Most of these cases say that when the intention can be discovered it will be followed. They also say that where the clauses cannot be reconciled the old rule will be applied. The question as to reconcilability covers a multitude of sins; and there seems to be a line of demar-

cation fully as real, if not as distinct, as that which featured the older conflict. The following cases illustrate the modern form of the controversy.

In *Saull* v. *Vagine,* 15 Ark. 695, a deed contained a proviso to the effect that in the event of the grantee's death during minority or before the birth of issue the property should revert to the grantors. The proviso was held void for repugnancy on the ground that it could not be reconciled with the granting clause and that the case was therefore a proper one for the application of the old rule. In *Ray* v. *Spears,* 23 Ky. L. Rep. 814, an attempt to limit an absolute estate by a proviso that if the grantee should die without children the property should revert to the grantor was held null and void, following the reasoning in the preceding case.

On the other hand, in *Theurmond* v. *Thurmond,* 88 Ga. 182, the granting clause vested an estate in two grantees, their heirs and assigns. A subsequent clause provided that at the death of one grantee his interest should go to certain other persons who were named. It was held that the intention was clearly shown to grant a life estate only to this grantee and the remainder was given effect.

In *Bassett* v. *Budlong,* 77 Mich. 338, there was a deed from a husband to his wife granting certain property to her, heir heirs and assigns forever, with restrictions as to conveying or mortgaging said property during the lifetime of the grantor without his consent, and in case of the death of the grantee prior to the grantor's decease the land was to revert to him and his heirs. The court held that the intention was clear that the grantee should receive only a life estate with a remainder contingent upon surviving the grantor, and gave it effect accordingly.

All of the preceding cases subscribe verbally to the modern doctrine of effectuating the intention of the parties. Each contains words which would not be out of place in the most liberal of the recent cases, yet their decisions cannot be reconciled. The influence of the old rule would seem to be responsible for the many cases where courts cannot reconcile clauses and are obliged to apply the common law doctrine, while other courts are able to discover and give effect to intentions of grantors on similar states of facts.

The Court of Appeals in *Kahaulelio* v. *Ihihi, supra,* went farther than many courts which have displayed on equal amount of verbal liberality would be willing to go. The effect of that decision is to hold that, despite the clear and unambiguous language of the granting clause, nothing whatever vested by the deed. Many courts would have evaded such a holding by seeking the easy refuge of irreconcilability and applying the old rule. The Supreme Court of Hawaii in the second trial of the same case rendered lip-service to the doctrine of intention, but added that positive rules of law govern the search, which is to say that the court is not in the least concerned with discovering or carrying out the real intent of the parties.

Considering the situation as a whole, it seems obvious that the problem is by no means settled, though loose language on the part of the courts has been responsible for many positive statements to the effect that the doctrine of repugnancy will now be applied only as a last resort. There is so much

difference of opinion as to what constitutes a "last resort" that the rule thus stated is little more than a nullity. Undoubtedly there has been a distinct change in the attitude of the courts during the past twenty years. Formerly, conflicts were settled with a casual reference to Blackstone or Kent for an expression of the old rule. Recent cases are few and far between which do not at least contain language to the effect that the intention of the parties will be effectuated if discoverable. A. W. B.

MORTGAGES UPON STOCK IN TRADE CONSISTING OF AUTOMOBILES.—The practice is very common among automobile dealers, upon the receipt of a shipment of automobiles, to procure loans from banking institutions in order to pay the drafts attached to the bills of lading, and to secure the loans by the execution of deeds of trust or chattel mortgages thereon. It has apparently been assumed that such a deed of trust or chattel mortgage, when properly executed and recorded, is valid against the claims of all persons whomsoever. This assumption has undoubtedly been predicated upon the well-established rule that priority of time gives priority of right, as between two equities, where all the statutory requirements of execution and recordation have been complied with. However, according to the generally accepted doctrine, when the mortgagor of a stock in trade is permitted by the mortgagee to remain in possession and to make sales therefrom in the ordinary course of business, applying the proceeds to his own use if he sees fit, the transaction is held to be fraudulent and void as to creditors. See 11 C. J. 573 for collection of authorities.

Although this rule has been repeatedly applied by the Virginia courts, chattel mortgages and deeds of trust placed upon automobiles by dealers were very common in that state. It has obviously been assumed that automobiles, because of their size, value and susceptibility of accurate description, did not come within the purview of this rule. This assumption was discovered to be erroneous when the Supreme Court of Virginia, in the case of *Boyce* v. *Finance and Guaranty Company,* in March, 1920, enunciated the rule that such deeds of trust or chattel mortgages, though properly executed and recorded, are void as to purchasers without notice. The rule would undoubtedly also be applied as to creditors. In that case the court said:

"Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage, regardless of its size, value, or capacity for identification. The powers which the dealer is permitted to exercise over the property in such care are inconsistent with a mortgage thereon.

"To require an examination of the records for liens in such cases would break up the business, and indeed be an embargo on legitimate trade. Capital must seek a more substantial security for its protection. Otherwise it were better that the few should suffer than the general public who have been